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# ***In the Supreme Court of the United States***

**OCTOBER TERM, 1946**

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**No. 833**

**MARION M. AMATO, INDIVIDUALLY AND DOING BUSINESS AS M. AMATO & SON, PETITIONER**

**v.**

**PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT**

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## **OPINIONS BELOW**

The opinion of the District Court is reported at 60 F. Supp. 361. The opinion of the Circuit Court of Appeals is reported at 157 F. 2d 719.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on October 26, 1946 (R. 36). The petition for a writ of certiorari was filed on December 30, 1946. Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether a person who, in compliance with an administrative subpoena, produces business records required to be kept by a regulation promulgated by the Administrator, thereby obtains immunity from an action for damages instituted by the Administrator pursuant to section 205 (e) of the Emergency Price Control Act of 1942.

#### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, Sec. 901 et seq.), the Compulsory Testimony Act of February 11, 1893 (27 Stat. 443, 49 U. S. C., Sec. 46), and Maximum Price Regulation 285 (7 F. R. 10481) are set forth in the Appendix, pp. 10-16.

#### STATEMENT

On November 4, 1944, a subpoena duces tecum personally signed by the Administrator was addressed to petitioner requiring him to produce specified business records (Exhibit 3, R. 12). On November 9, 1944, petitioner and his counsel appeared and produced the documents required by the subpoena, after stating that the documents were produced involuntarily and under compulsion and after claiming that petitioner was privileged from producing them because they might

incriminate him or subject him to a penalty (R. 20, 21).

On January 20, 1945, the Administrator instituted an action for damages against petitioner under Section 205 (e) of the Emergency Price Control Act. The complaint alleged that petitioner violated Maximum Price Regulation No. 285 in charging prices for bananas aggregating \$831.36 in excess of those established by the Regulation (R. 1-7). Petitioner moved to dismiss the complaint on the ground, among others, that the action was precluded by Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of February 11, 1893 (R. 7). He also moved to suppress the evidence obtained by the Administrator pursuant to subpoena on the ground that such evidence was obtained by an illegal search and seizure contrary to the Fourth Amendment (R. 8-10). The district court held that the records required to be produced by subpoena were records required by law to be kept; that under the Fifth Amendment the privilege against self-incrimination does not extend to the production of such records; and, therefore, that Section 202 (g) did not confer immunity on petitioner from this action. Accordingly, the court overruled the motion to suppress the evidence (R. 28).

After a pre-trial conference the district court rendered judgment for respondent in the amount

of \$751.37 (R. 29, 30). The Circuit Court of Appeals affirmed the judgment (R. 36) on the ground stated by the District Court and on the additional ground that the action for damages was civil and remedial and not criminal, and therefore any immunity obtained under the Act did not apply here.

#### ARGUMENT

No question is presented by petitioner here concerning the Fourth Amendment, or concerning immunity resulting from oral testimony. The sole questions are (1) whether the petitioner's involuntary production of his business records gave rise to immunity under Section 202 (g) of the Act; and (2) if so, whether such immunity was broad enough to bar the Administrator from suing for damages under Section 205 (e).

1. Section 202 (b) of the Act empowers the Administrator, "by regulation or order, to require any person who is engaged in the business of dealing with any commodity \* \* \* to make and keep records and other documents, and to make reports." Pursuant to this authority the Administrator, in Maximum Price Regulation 285 effective December 18, 1942, required (see Appendix, p. 16) every person selling fresh bananas for which maximum prices were established by the regulation to (1) preserve for examination all his records, including invoices, re-

lating to the prices which he charged pursuant to the regulation, (2) prepare and preserve for examination a statement showing his customary allowances, discounts, and other price differentials, and (3) keep and preserve records of the same kind as he had customarily kept, relating to the prices which he charged for fresh bananas after the effective date of the regulation. The records called for by the subpoena and produced by petitioners were "purchase and sales invoices reflecting purchase and sales of fruits and vegetables" from January 1, 1944 to November 4, 1944 (R. 12). Hence, they clearly were required to be kept and preserved by the regulation.

*Wilson v. United States*, 221 U. S. 361, established the principle that the Fifth Amendment does not protect the custodian of records required to be kept by law from their production pursuant to lawful demand, even though they may incriminate the custodian. Mr. Justice Hughes, speaking for this Court, said (221 U. S. at 380):

The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which

exists as to private papers cannot be maintained.<sup>1</sup>

And see *United States v. White*, 322 U. S. 694, 699; *Rodgers v. United States*, 138 F. 2d 992 (C. C. A. 6); *Pulford v. United States*, 155 F. 2d 944 (C. C. A. 6); *Sims v. United States*, 268 Fed. 234 (C. C. A. 8); *C. M. Spring Drug Co. v. United States*, 12 F. 2d 852 (C. C. A. 8); *Bowles v. Insel*, 148 F. 2d 91 (C. C. A. 3); *Marron v. United States*, 8 F. 2d 251, 255 (C. C. A. 9), affirmed, 275 U. S. 192; *Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566, 571 (C. C. A. 9), certiorari denied, 325 U. S. 877; *Sargent v. United States*, 35 F. 2d 344 (C. C. A. 9); *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 744, 779 (C. C. A. 10); Wigmore Evidence (3d Ed. 1940) Sec. 2259c.

Since petitioner had no privilege to refuse production of the records involved, he obtained no immunity under Section 202 (g) of the Act. That section provides that no person shall be excused from complying with any requirement under Section 202 because of his privilege against self-incrimination, but that the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege. The pur-

<sup>1</sup> In *Davis v. United States*, decided June 10, 1946, No. 404, Oct. Term, 1945, this Court referred to the *Wilson* case, and held that (slip sheet, p. 8) "where the officers seek to inspect public documents at a place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where private papers are sought."



pose of this and other immunity statutes was explained as follows by Mr. Justice Holmes in *Heike v. United States*, 227 U. S. 131, 142:

But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned.

Accordingly where, as here, no privilege exists at all with respect to particular documents or testimony, no immunity results from their compulsory production. See *Coleman v. United States*, 153 F. 2d 400 (C. C. A. 6); *Bowles v. Seitz*, 62 F. Supp. 773 (W. D. Tenn.).

2. Even if the records produced by petitioner in response to the subpoena were privileged and their production gave rise to an immunity, such immunity would not apply to this action for damages under Section 205 (e). Section 202 (g) of the Act incorporates the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (49 U. S. C. 46), which provides that no person who has been compelled to produce evidence or testify shall be:

prosecuted or subjected to any penalty or forfeiture for or on account of any trans-

action, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise \* \* \*.

Clearly, the "penalties" and "forfeitures" referred to in the statute are the same penalties and forfeitures comprehended by the self-incrimination provision of the Fifth Amendment. In both cases the penalties and forfeitures involved are criminal: neither includes *civil* penalties and forfeitures. Where a statutory sanction does not have punishment for its sole purpose but is designed to compensate for past wrongs or protect against future injuries, it is not criminal but remedial. *Helvering v. Mitchell*, 303 U. S. 391; *United States ex rel Marcus v. Hess*, 317 U. S. 537. The damages sanction imposed by Section 205 (e) is clearly remedial. Its purpose is primarily to protect the public, and is of a type (i. e., multiple damages) which has traditionally been regarded as remedial. See *United States ex rel. Marcus v. Hess*, *supra*, at 549; *Stockwell v. United States*, 13 Wall. 531, 549; *Crary v. Porter*, 157 F. 2d 410, 414 (C. C. A. 8). A separate provision of the Emergency Price Control Act, Section 205 (b), provides a distinctively criminal sanction (fine or imprisonment) for willful violations.

#### CONCLUSION

The decision of the Court below is correct. No conflict of decision appears, and there is no war-

rant for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

✓ GEORGE T. WASHINGTON,  
*Acting Solicitor General.*

WILLIAM E. REMY,  
*Deputy Commissioner for Enforcement,*

✓ DAVID LONDON,  
*Director, Litigation Division,*

SAMUEL MERMIN,  
*Solicitor, Litigation Division,*

WALTER D. MURPHY,  
*Special Appellate Attorney,*  
*Office of Price Administration,*  
*Office of Temporary Controls.*

JANUARY 1947.

## APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942, as amended by the Stabilization Extension Act of 1944 (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, Sec. 901 et. seq.):

### Section 202 (a):

The Administrator is authorized to make such studies and investigations, *to conduct such hearings*,<sup>1</sup> and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

### Section 202 (b):

The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena re-

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<sup>1</sup> Added by Section 105 (a) of Stabilization Extension Act of June 30, 1944.

quire any such person to appear and testify or to appear and produce documents, or both, at any designated place.

**Section 202 (c) :**

For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

**Section 202 (d) :**

The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

**Section 202 (e) :**

In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall

be in addition to the provisions of section 4 (a).

Section 202 (g):

No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

Section 205 (b):

Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Section 205 (e):

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one*

year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.*<sup>1</sup> For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.<sup>2</sup> If any person selling a commodity violates a regulation, order, or price schedule prescribing

<sup>1</sup> As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"\* \* \* bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

<sup>2</sup> Added by sec. 108 (b) of Stabilization Extension Act of 1944.

a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.*<sup>3</sup>

2. The Compulsory Testimony Act of February 11, 1893 (27 Stat. 443, 49 U. S. C. 46):

\* \* \* no person shall be excused from attending and testifying or from producing

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<sup>3</sup> As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"\* \* \* is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."



books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena; or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying:

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

3. Pertinent provisions of Maximum Price Regulation 285 \* (7 F. R. 10481): Paw

§ 1351.1261. *Records and Reports.* (a) Every person selling fresh bananas for which maximum prices are established by this regulation shall:

(1) Preserve for examination by the Office of Price Administration all his records, including invoices or other written evidences of a sale and delivery, relating to the prices which he charges pursuant to the provisions of this regulation.

(2) Prepare on or before December 31, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing all of his customary allowances, discounts, and other price differentials.

(b) Every person making a sale of fresh bananas for which maximum prices are established by this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, is in effect, records of the same kind as he has customarily kept relating to the prices which he charges for fresh bananas after the effective date of this regulation and in addition records showing as precisely as possible the basis upon which he determined the maximum prices for fresh bananas.

\* This Regulation was effective on December 18, 1942, and remained in force until superseded by Revised Maximum Price Regulation 285 (10 F. R. 1493), effective February 12, 1945.